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DEPARTMENT OF AGRICULTURE

Food and Nutrition Service

7 CFR Part 253

[FNS-2011-0036]

RIN: 0584-AE05

Food Distribution Program on Indian Reservations: Income Deductions and Resource Eligibility

AGENCY: Food and Nutrition Service, USDA.

ACTION: Proposed rule.

SUMMARY: This rule proposes to amend regulations for the Food Distribution Program on Indian Reservations (FDPIR). The changes are intended to simplify and improve the administration of and expand access to FDPIR, and promote conformity with the Supplemental Nutrition Assistance Program (SNAP). First, the Department proposes an amendment that would eliminate household resources from consideration when determining FDPIR eligibility. Second, to more closely align FDPIR and SNAP regulations, the Department proposes to expand the current FDPIR income deduction for Medicare Part B Medical Insurance and Part D Prescription Drug Coverage premiums to include other monthly medical expenses in excess of \$35 for households with elderly and/or disabled members. This rule also proposes to establish an income deduction for shelter and utility expenses. Finally, the Department proposes verification requirements related to the proposed income deductions and revisions to the household reporting requirements that will more closely align FDPIR and SNAP regulations.

DATES: To be assured of consideration, comments must be received on or before
[INSERT DATE 90 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: The Food and Nutrition Service (FNS) invites interested persons to submit comments on this proposed rule. You may submit comments identified by Regulatory Identifier Number (RIN) 0584-AE05, by any of the following methods:

- Federal eRulemaking Portal: Go to <http://www.regulations.gov>. In the Enter Keyword or ID field insert “**FNS-2011-0036**”, and then click on Search. Click on Submit a Comment.
- Information on using Regulations.gov, including detailed instructions for accessing documents, making comments, and viewing submitted comments is available through the site’s “FAQs” link.
- Fax: Submit comments by facsimile transmission to (703) 305-2782.
- Disk or CD-ROM: Submit comments on disk to Laura Castro, Director, Food Distribution Division, Food and Nutrition Service, U.S. Department of Agriculture, 3101 Park Center Drive, Room 504, Alexandria, Virginia 22302-1594.
- Mail: Send comments to Laura Castro at the above address.
- Hand Delivery or Courier: Deliver comments to the above address.

Comments submitted in response to this rule will be included in the record and will be made available to the public. Please be advised that the substance of the comments

and the identity of the individuals or entities submitting the comments will be subject to public disclosure. The Department will make the comments publicly available on the Internet via <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Dana Rasmussen by telephone at (703) 305-2662.

SUPPLEMENTARY INFORMATION:

- I. Public Comment Procedures
- II. Background and Discussion of the Proposed Rule
- III. Procedural Matters

I. Public Comment Procedures

Your written comments on the proposed rule should be specific, should be confined to issues pertinent to the proposed rule, and should explain the reason(s) for any change you recommend or proposal(s) you oppose. Where possible, you should reference the specific section or paragraph of the proposal you are addressing. Comments received after the close of the comment period (see DATES) will not be considered or included in the Administrative Record for the final rule.

Executive Order 12866 requires each agency to write regulations that are simple and easy to understand. We invite your comments on how to make these proposed regulations easier to understand, including answers to questions such as the following:

- (1) Are the requirements in the proposed regulations clearly stated?

- (2) Does the rule contain technical language or jargon that interferes with its clarity?
- (3) Does the format of the rule (e.g., grouping and order of sections, use of heading, and paragraphing) make it clearer or less clear?
- (4) Would the rule be easier to understand if it was divided into more (but shorter) sections?
- (5) Is the description of the rule in the preamble section entitled “Background and Discussion of the Proposed Rule” helpful in understanding the rule? How could this description be more helpful in making the rule easier to understand?

II. Background and Discussion of the Proposed Rule

The Department proposes to amend the regulations for FDPIR at 7 CFR Part 253. These changes are intended to improve the administration of FDPIR and service to program applicants and participants, and respond to a resolution passed by the membership of the National Association of Food Distribution Programs on Indian Reservations (NAFDPIR) in June 2009. These proposed provisions would simplify program administration and promote conformity with SNAP. The Department proposes amendments that would: 1) eliminate household resources from consideration when determining FDPIR eligibility; 2) expand the current income deduction for Medicare Part B Medical Insurance and Part D Prescription Drug Coverage premiums to include other monthly medical expenses in excess of \$35 for households with elderly and/or disabled members, as defined at 7 CFR 253.2; 3) establish an income deduction for shelter and utility expenses; and 4) establish verification requirements related to the proposed income deductions and revise household reporting requirements. The amendments are discussed

in more detail below.

In the following discussion and regulatory text, the term “State agency,” as defined at 7 CFR 253.2, is used to include Indian Tribal Organizations (ITOs) authorized to operate FDPIR and Food Distribution Program for Indian Households in Oklahoma (FDPIHO) in accordance with 7 CFR Parts 253 and 254. The term “FDPIR” is used in this rulemaking to refer collectively to FDPIR and FDPIHO.

1. Eliminate the Eligibility Criterion Based on Household Resources – 7 CFR 253.6(d)

Currently, the FDPIR household resource limits are \$3,250 for households with at least one elderly/disabled member and \$2,000 for all other households. In response to a separate rulemaking published in the Federal Register on April 27, 2010 (75 FR 22027), which proposed to amend FDPIR regulations by aligning provisions with changes to SNAP as a result of the Food, Conservation, and Energy Act of 2008, FNS received numerous comment letters regarding the FDPIR household resource eligibility criterion. Many of the comment letters supported elimination of the FDPIR resource test or alignment of FDPIR and SNAP policies. Based on the comments received, the Department proposes to eliminate the household resource eligibility criterion in FDPIR. In the regulatory impact analysis of this proposed rule, we estimate that eliminating the resource test would increase FDPIR participation by less than one percent. Removal of the resource test would streamline the certification process for new and currently participating households and simplify program administration, reducing the burden on State agency certification staff and improving service to those in need of nutrition assistance. To eliminate the resource standard from current regulations, the Department

proposes to remove the regulatory provisions at 7 CFR 253.6(d). This proposal does not affect the requirement that households meet maximum FDPIR income limits and other eligibility criteria provided under current program regulations.

The Department also proposes conforming amendments to remove reference to the resource test throughout the current FDPIR regulations. The proposed amendments to 7 CFR 253.6(c) on categorical eligibility remove reference to resource eligibility. This rule would also remove 7 CFR 253.7(f)(2)(i), which currently references resources of disqualified household members. The rule would redesignate the current paragraphs at 7 CFR 253.7(f)(2)(ii) and (f)(2)(iii) as paragraphs (f)(2)(i) and (f)(2)(ii), respectively.

The Department also proposes an amendment to 7 CFR 253.6(e)(3)(viii) (to be redesignated as 7 CFR 253.6(d)(3)(viii)), which currently references non-recurring lump sum payments, such as security deposits on rental property or utilities, tax refunds, and retroactive Social Security payments. The amendment would remove the language that provides these payments are counted as resources in the month received. Therefore, non-recurring lump sum payments would not be considered in determining the eligibility of households for FDPIR.

The Department proposes similar treatment of periodic per capita payments that are derived from the profits of Tribal enterprises and distributed to Tribal members less frequently than monthly. As with non-recurring lump sum payments, the amount and time of receipt of periodic per capita payments cannot always be anticipated by FDPIR participants in order to be considered during the household's income eligibility determination. Consequently, non-monthly per capita payments are reported upon receipt in accordance with the change reporting requirements at 7 CFR 253.7(c). In most

instances, receipt of these payments does not impact household eligibility in the month of receipt because there is not sufficient time for the State agency to take action to terminate the household if the payment results in the household's ineligibility. In accordance with 7 CFR 253.7(c), households must report a change within 10 calendar days, and the State agency must act on the reported change and issue a notice of adverse action no later than 10 days after the change is reported. The notice of adverse action must provide a minimum of 10 days from the date of the notice to the date upon which the termination becomes effective. Under current regulations, funds from the per capita payment that remain available to the household in the month after receipt are considered a resource.

In accordance with the proposal to remove consideration of household resources in determining eligibility for FDPIR, the Department proposes to amend 7 CFR 253.6(e)(3)(viii) (to be redesignated as 7 CFR 253.6(d)(3)(viii)) to specify that non-recurring lump sum payments and non-monthly per capita payments would no longer be considered in determining the eligibility of households for FDPIR. Furthermore, the Department proposes to amend 7 CFR 253.6(e)(2)(ii) (to be redesignated as 7 CFR 253.6(d)(2)(ii)) to clarify that per capita payments received monthly are considered unearned income in the month received. This is consistent with current program policy.

2. Medical Expense Deduction – 7 CFR 253.6(f) (to be redesignated as 7 CFR 253.6(e))

The Department proposes a change that would revise the provisions at 7 CFR 253.6(f)(4) (to be redesignated as 7 CFR 253.6(e)(4)) to expand the current deduction for Medicare Part B Medical Insurance and Part D Prescription Drug Coverage premiums to include other monthly medical expenses in excess of \$35 incurred by any household

member who is elderly or disabled as defined in 7 CFR 253.2. This change would align FDPIR and SNAP regulations. Also, this change would respond to Resolution 2009-01 passed by the membership of NAFDPIR in June 2009. That resolution requested an income deduction for unreimbursed medical expenses for prescription drugs and other medical expenses, other than for plastic surgery. As provided above, in order to reflect the proposed elimination of 7 CFR 253.6(d), we are proposing to redesignate current 7 CFR 253.6(f) as proposed paragraph (e).

The Department proposes to adopt SNAP policy at 7 CFR 273.9(d)(3) in regard to allowable medical costs. The proposed allowable medical costs are:

(a) Medical and dental care, including psychotherapy and rehabilitation services, provided by a licensed practitioner authorized by State law or other qualified health professional;

(b) Hospitalization or outpatient treatment, nursing care, and nursing home care, including payments by the household for an individual who was a household member immediately prior to entering a hospital or nursing home, provided by a facility recognized by the State;

(c) Prescription drugs when prescribed by a licensed practitioner authorized under State law and other over-the-counter medication (including insulin) when approved by a licensed practitioner or other qualified health professional; in addition, costs of medical supplies, sick-room equipment (including rental) or other prescribed equipment are deductible;

(d) Health and hospitalization insurance policy premiums. Costs that are not deductible include health and accident policies such as those payable in lump sum

settlements for death or dismemberment, or income maintenance policies such as those that continue mortgage or loan payments while the beneficiary is disabled;

(e) Medicare premiums related to coverage under Title XVIII of the Social Security Act; any cost-sharing or spend down expenses incurred by Medicaid recipients;

(f) Dentures, hearing aids, and prosthetics;

(g) Securing and maintaining a seeing eye or hearing dog including the cost of dog food and veterinarian bills;

(h) Eye glasses prescribed by a physician skilled in eye disease or by an optometrist;

(i) Reasonable cost of transportation and lodging to obtain medical treatment or services; and

(j) Maintaining an attendant, homemaker, home health aide, child care services, or housekeeper, necessary due to age, infirmity, or illness.

SNAP regulations at 7 CFR 273.9(d) include an income deduction for [all](#) Medicare premium expenses in excess of \$35. Current FDPIR regulations at 7 CFR 253.6(f)(4) and program policy permit only a deduction for the full amounts of Medicare Part B Medical Insurance and Part D Prescription Drug Coverage premiums, respectively. In order to simplify program administration and in recognition of the significantly expanded range of deductible medical costs considered allowable under SNAP, the Department proposes to align the Medicare provision with SNAP by permitting deductions for all Medicare premiums in excess of \$35.

The SNAP regulations at 7 CFR 273.9(d)(3)(x) allow a deduction for an amount equal to the SNAP benefit for a one-person household if the household furnishes the

majority of a home care attendant's meals. The Department proposes to adopt this same provision for FDPIR.

Regarding the proposed meal-related deduction, the Department purchases the USDA foods provided under FDPIR at a reduced cost due to high volume purchases under long-term contracts with vendors. Consequently, the estimated average monthly per person FDPIR food package cost, which is adjusted annually, does not represent the retail value of the food package if identical foods were purchased by a family at a grocery store. The Department believes that it would be appropriate to adopt the SNAP policy of basing the meal-related deduction for the attendant on the maximum SNAP allotment for a one-person household. The SNAP allotments are based on the Thrifty Food Plan (TFP), which reflects current dietary recommendations, food consumption patterns, food composition data, and food prices.

The Department would provide the State agencies, on an annual basis, the updated amount of the maximum SNAP allotment for a one-person household. The State agency would not be required to update the meal-related deduction amount until the household's next scheduled recertification, but may opt to do so earlier if that amount is available. If a household incurs attendant care costs that could qualify under both the medical deduction and dependent care deduction, the State agency would treat the cost as a medical expense.

3. Shelter and Utility Expense Deduction – 7 CFR 253.6(f) (to be redesignated as 7 CFR 253.6(e))

The Department proposes a change that would revise the provisions at 7 CFR 253.6(f) (to be redesignated as 7 CFR 253.6(e)) to establish region-specific standard income

deductions for monthly shelter and utility expenses. This change would respond to Resolution 2009-01 passed by the membership of NAFDPIR in June 2009. The resolution noted that shelter expenses such as home heating fuel and utilities may impact a household's ability to obtain food, and such factors are not currently factored into FDPIR eligibility determinations. SNAP regulations under 7 CFR Part 273 allow standard income deductions for shelter expenses in determining eligibility for that program.

Under this proposal, an FDPIR applicant household would receive a standard deduction if it incurs the cost of at least one allowable shelter/utility expense. The Department proposes to indicate that allowable shelter and utility expenses would conform to those expenses allowable for SNAP under 7 CFR 273.9(d)(6)(ii). Such expenses include the following:

- (a) Continuing charges for the shelter occupied by the household, including rent, mortgage, condominium and association fees, or other continuing charges leading to the ownership of the shelter such as loan repayments for the purchase of a mobile home, including interest on such payments.

- (b) Property taxes, State and local assessments, and insurance on the structure itself, but not separate costs for insuring furniture or personal belongings.

- (c) The cost of fuel for heating or cooling (i.e., the operation of air conditioning systems or room air conditioners); electricity or fuel used for purposes other than heating or cooling; water; sewerage; well installation and maintenance; septic tank system installation and maintenance; garbage and trash collection; all service fees required to provide service for one telephone, including, but not limited to, basic service fees, wire

maintenance fees, subscriber line charges, relay center surcharges, 911 fees, and taxes; and fees charged by the utility provider for initial installation of the utility. One-time deposits are not deductible.

(d) The shelter costs for the home if temporarily not occupied by the household because of employment or training away from home, illness, or abandonment caused by a natural disaster or casualty loss. For costs of a home vacated by the household to be included in the household's shelter costs, the household must intend to return to the home; the current occupants of the home, if any, must not be claiming the shelter costs for program purposes; and the home must not be leased or rented during the absence of the household.

(e) Charges for the repair of a home that was substantially damaged or destroyed due to a natural disaster such as a fire or flood. Shelter costs cannot include charges for repair of the home that have been or will be reimbursed by private or public relief agencies, insurance companies, or from any other source.

The amount of the deduction would be regionally based. The Department proposes to implement shelter/utility expense standard deductions specific to four regions: (1) Northeast/Midwest, (2) Southeast/Southwest, (3) Mountain Plains, and (4) West. The Department would, on an annual basis, calculate the shelter/utility standard deductions for each region, starting from a region-specific baseline deduction. The proposed baseline for each FDPIR regional shelter/utility standard deduction is provided below, which assumes implementation in Fiscal Year 2013.

**Projected FY 2013 FDPIR Standard Shelter/Utility Expense Deductions
Baseline by Region**

Region	States Currently with FDPIR Programs	Shelter/Utility Deduction
Northeast/Midwest	Michigan, Minnesota, New York, Wisconsin	\$350
Southeast/Southwest	Mississippi, New Mexico, North Carolina, Oklahoma, Texas	\$300
Mountain Plains	Colorado, Kansas, Montana, Nebraska, North Dakota, South Dakota, Utah, Wyoming	\$400
West	Alaska, Arizona, California, Idaho, Nevada, Oregon, Washington	\$350

In developing the regional groupings and baseline shelter/utility standard deductions, the Department considered data from a number of sources, including national surveys of shelter costs and data on SNAP participants' shelter deductions. The Department also considered where FDPIR programs currently operate. If new programs are approved to administer FDPIR in States not listed above, the Department would identify the appropriate regional grouping for each new State.

The Department would, on an annual basis, calculate the shelter/utility standard deductions for each region. As part of the annual calculation, the Department would adjust the previous year's regional shelter/utility expense standard deduction amounts to account for changes to SNAP Quality Control data, rounding to the nearest \$50. The Department would issue the revised shelter/utility standard deductions prior to October 1 each year.

Under the proposed provision, an applicant household that would qualify for a shelter/utility standard deduction would have the option to receive the appropriate

deduction amount for the State in which the household resides or the State in which the State agency's central administrative office is located. These States could potentially be located in two different regions which have different shelter/utility expense standard deductions.

The Department believes that the proposed shelter/utility provisions are easy to understand and promote simplicity and efficiency in program administration. Because the Department would issue the regional shelter/utility standard deductions annually, no undue burden would be placed on State agencies to determine such amounts. Furthermore, as proposed, FDPIR households would not be required to produce documentation for all shelter/utility expenses; households would need only to provide documentation for one allowable shelter/utility expense. The State agency would apply the appropriate regional standard shelter deduction and would not be required to perform an additional calculation to determine the household's shelter deduction amount. This simplifies the application and certification processes, preventing an undue burden on applicants and State agency staff. Because the shelter/utility standard deductions would be region-specific, such deductions would recognize the variability in shelter and utility costs across the nation.

4. Verification Requirements and Household Reporting - 7 CFR 253.7(a)(6)(i) and 7 CFR 253.7(c)(1)

The Department proposes new household verification requirements related to the two proposed income deductions discussed above. Amendments are proposed to 7 CFR 253.7(a)(6)(i) to revise the current verification requirements for Medicare Part B and Part D premiums to reflect the proposed expanded medical expense deduction. Also, an

amendment is proposed to add a verification requirement for shelter and utility expenses at 7 CFR 253.7(a)(6)(i). As indicated above, applicant households must show proof of at least one allowable shelter/utility expense to receive the FDPIR standard deduction for shelter/utility expenses.

The Department also proposes amendments to the reporting requirements at 7 CFR 253.7(c)(1) to reorganize this section for better comprehension, and to improve the administration of FDPIR and service to program applicants and participants. First, the Department proposes a requirement for households to report a change in residence and when they no longer have shelter/utility expenses. Households that do not have shelter/utility expenses would not qualify for the standard deduction for shelter/utility expenses proposed in this rulemaking. Therefore, the Department believes it is reasonable to require households to report if they no longer have such expenses so the State agency can determine if the household continues to meet the FDPIR financial eligibility criteria. A change in residence often results in a change to shelter/utility expenses. In addition, a change in residence may also impact a household's eligibility if the household no longer meets the residency requirement under FDPIR. Eligible households must reside on a participating reservation or in approved FDPIR service areas outside of a reservation or in the state of Oklahoma. Therefore, a change in residence might result in a household becoming ineligible for FDPIR benefits.

The Department also proposes a new requirement under 7 CFR 253.7(c)(1) that households report changes in the legal obligation to pay child support. Households that do not have a legal obligation to pay child support do not qualify for the current child support deduction. Therefore, the Department believes it is reasonable to require the

reporting of this change so that service providers can determine if households continue to meet the FDPIR financial eligibility criteria.

Finally, the Department proposes a revision regarding the reporting of changes in income. The current provisions at 7 CFR 253.7(c)(1) require households to report changes in income that would necessitate a change in the eligibility determination. The State agencies are required to advise each household at the time of certification the maximum monthly income limit for its household size, so the household will know to report an increase in income above that limit. The Department does not believe that this methodology is practical. A household's monthly net income amount, which is compared to the monthly income limit, is calculated by subtracting allowable deductions from the household's gross income. Households cannot be expected to know how an increase in monthly gross income will impact its monthly net income amount, because such households are not knowledgeable about the net monthly income calculation. Therefore, the Department proposes an amendment to regulations at 7 CFR 253.7(c)(1) to require households to report an increase of more than \$100 in gross monthly income. This change would provide a more effective guideline for households to determine when changes in income must be reported.

III. Procedural Matters

A. Executive Order 12866 and Executive Order 13563

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563

emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

This proposed rule has been designated a “significant regulatory action,” although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget.

B. Regulatory Impact Analysis

1. Need for Action

This action is needed to ensure that regulations pertaining to income deductions are more consistent between FDPIR and SNAP. FDPIR was established by the Congress in 1977 as an alternative to SNAP for low-income households living on or near Indian reservations; these households may not have easy access to SNAP offices and authorized grocery stores. Both programs offer a standard deduction, an earned income deduction, a child support deduction, and a dependent care deduction. SNAP also offers an excess medical expense deduction and an excess shelter expense deduction. Unlike SNAP, the medical deduction currently offered in FDPIR is limited to the amount households pay for Medicare Part B and Part D premiums. FDPIR does not offer an income deduction for shelter and utility expenses.

This proposed rulemaking responds to a resolution passed by the membership of the NAFDPIR in June 2009 that requested income deductions for home heating expenses and other utilities, prescription medications, and other out-of-pocket medical expenses. The NAFDPIR resolution stated that the FDPIR income eligibility criteria unfairly penalizes households whose net monthly income is determined to be over the income standard by

as little as one dollar, while many of these households have monthly shelter, utility, and/or medical expenses. NAFDPIR believes that some low-income households are forced to choose between paying for food and paying for heat and/or medicine.

FNS received numerous comment letters in response to separate proposed rulemaking supporting elimination of the FDPIR resource test or alignment of FDPIR and SNAP policies. This proposed rule would eliminate the household resource eligibility criterion for FDPIR. Removal of the resource test would streamline the certification process for new and currently participating households and simplify program administration, reducing the burden on State agency certification staff and improving service to those in need of nutrition assistance.

2. Benefits

This rule proposes to amend FDPIR regulations to improve the administration of and expand access to FDPIR. This rule also promotes parity with the eligibility requirements in SNAP. These regulatory changes are designed to help ensure that FDPIR benefits are provided to low-income households living on or near Indian reservations that are in need of nutrition assistance. The proposed changes to the FDPIR regulations could potentially increase participation, thus expanding access to FDPIR and increasing nutrition assistance for the targeted population.

FNS projects the impact of the proposed changes on FDPIR participation, as follows:

(a) Elimination of the Household Resource Limit. This provision is projected to increase participation ranging from approximately 189 individuals in the first year of implementation to 568 individuals 3 years later;

(b) Medical Expense Deduction. This provision would potentially make some elderly and/or disabled individuals with sizeable monthly medical expenses newly eligible for FDPIR. The projected increase in participation ranges from approximately 67 individuals in the first year of implementation to 201 individuals three years later; and

(c) Shelter/Utility Expense Deduction. This provision is projected to increase participation ranging from approximately 752 individuals in the first year of implementation to 2,257 individuals three years later.

There is some uncertainty associated with the estimates above given the limitations on relevant data pertaining to FDPIR participants. Also, the impact of each provision on participation was evaluated independently from the other provisions, so the combined effect or overlap of these provisions is unknown. It is expected that some individuals might benefit from more than one provision. For example, an elderly household may qualify for both the medical expense deduction and the shelter/utility expense deduction.

3. Cost

This action is not expected to significantly increase costs of State and local agencies, or their commercial contractors, though these costs cannot be determined with any accuracy. ITOs and State agencies that administer FDPIR are required to provide 25 percent of the funds necessary to operate the program. This requirement may be waived with FNS approval if compelling justification exists. Any increased ITO/State agency costs resulting from this rulemaking would be related to an increase in the ITO/State agency share of administrative costs to serve additional households made eligible by this rule.

FNS projects the impact of the proposed changes on federal costs (i.e., program benefits), which are attributable to potential increases in participation.

(a) Elimination of the Household Resource Limit. FNS estimates that this provision would cost \$1,857,000 over a 5-year period.

(b) Medical Expense Deduction. FNS estimates that this provision would cost \$656,000 over a five-year period.

(c) Shelter/Utility Expense Deduction. FNS estimates that this provision would cost \$7,375,000 over a five-year period.

As with the estimates on the impact on participation, there is some uncertainty associated with the cost estimates above. Also, as indicated above, the impact of each provision on participation was evaluated independently from the other provisions, so the combined effect or overlap of these provisions is unknown. If individuals benefit from more than one provision, the estimated cost to the federal government would be less.

C. Regulatory Flexibility Act

This proposed rule has been reviewed with regard to the requirements of the Regulatory Flexibility Act of 1980 (5 U.S.C. 601-612). It has been certified that this rule will not have a significant impact on a substantial number of small entities. While program participants and ITOs and State agencies that administer FDPIR and the Food Distribution Program for Indian Households in Oklahoma will be affected by this rulemaking, the economic effect will not be significant.

D. Public Law 104-4

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, the Department generally must prepare a written statement, including a cost/benefit analysis, for proposed and final rules with Federal mandates that may result in expenditures by State, local, or Tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. When such a statement is needed for a rule, section 205 of the UMRA generally requires the Department to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, more cost-effective, or least burdensome alternative that achieves the objectives of the rule.

This rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) that impose on State, local, and Tribal governments or the private sector expenditures of \$100 million or more in any one year. This rule is, therefore, not subject to the requirements of sections 202 and 205 of the UMRA.

E. Executive Order 12372

The program addressed in this action is listed in the Catalog of Federal Domestic Assistance under No. 10.567. For the reasons set forth in the final rule in 7 CFR part 3015, Subpart V, and related Notice published at 48 FR 29114, June 24, 1983, the donation of foods in such programs is included in the scope of Executive Order 12372, which requires intergovernmental consultation with State and local officials.

F. Executive Order 13132

Executive Order 13132 requires Federal agencies to consider the impact of their regulatory actions on State and local governments. Where such actions have federalism implications, agencies are directed to provide a statement for inclusion in the preamble to the regulations describing the agency's considerations in terms of the three categories called for under section (6)(b)(2)(B) of Executive Order 13132.

1. Prior Consultation with Tribal/State Officials

The programs affected by the regulatory proposals in this rule are all Tribal or State-administered federally funded programs. FNS' national and regional offices have formal and informal discussions with State agency officials and representatives on an ongoing basis regarding program issues relating to FDPIR. FNS meets annually with the NAFDPIR membership, a national group of Tribal and State-appointed FDPIR Program Directors, to discuss issues relating to FDPIR. FNS also meets with the NAFDPIR Board on a more frequent basis.

The changes proposed in this rulemaking related to the deduction for shelter and utility expenses are based on a resolution passed by the NAFDPIR membership in June 2009, and were discussed with the NAFDPIR Board and its membership. This rulemaking was also the subject of formal consultation with Tribal officials held in seven locations in October 2010 through January 2011, as discussed below.

2. Nature of Concerns and the Need to Issue This Rule

Eligible low-income households living in areas served by FDPIR may choose to participate in either FDPIR or SNAP. SNAP regulations offer an income deduction for excess shelter expenses and an income deduction for allowable monthly medical

expenses in excess of \$35 for households with elderly and/or disabled members. This proposed rulemaking would respond to a resolution passed by the membership of the NAFDPIR in June 2009 that requested income deductions for home heating expenses and utilities, prescription medications, and other out-of-pocket medical expenses. The NAFDPIR resolution read that the FDPIR income eligibility criteria unfairly penalizes households whose net monthly income is determined to be over the income standard by as little as one dollar, while many of these households have monthly shelter, utility and/or and medical expenses. NAFDPIR believes that some low-income households are forced to choose between paying for food and paying for heat and/or medicine.

FNS also received numerous comment letters in response to separate proposed rulemaking supporting elimination of the FDPIR resource test or alignment of FDPIR and SNAP policies. This proposed rulemaking responds to the concerns raised by commenters.

3. Extent to Which We Meet Those Concerns

The Department has considered the impact of this rule on ITOs and State agencies that administer FDPIR. The Department does not expect the provisions of this rule to conflict with any State or local law, regulations, or policies. The overall effect of this rule is to ensure that low-income households living on or near Indian reservations receive nutrition assistance.

G. Executive Order 12988

This proposed rule has been reviewed under Executive Order 12988, “Civil Justice Reform.” Although the provisions of this rule are not expected to conflict with any State

or local law, regulations, or policies, the rule is intended to have preemptive effect with respect to any State or local laws, regulations, or policies that conflict with its provisions or that would otherwise impede its full implementation. This rule is not intended to have retroactive effect. Prior to any judicial challenge to the provisions of this rule or the applications of its provisions, all applicable administrative procedures must be exhausted.

H. Civil Rights Impact Analysis

The Department has reviewed this rule in accordance with the Department Regulation 4300-4, “Civil Rights Impact Analysis,” to identify and address any major civil rights impacts the rule might have on minorities, women, and persons with disabilities.

Consistent with current SNAP regulations, the proposed provision to expand the current income deduction for Medicare Part B Medical Insurance and Part D Prescription Drug Coverage premiums to include other allowable monthly medical expenses in excess of \$35 would apply only to households with elderly and/or disabled members, as defined at 7 CFR 253.2. However, after a careful review of the rule’s intent and provisions, the Department has determined that this rule will not in any way limit or reduce the ability of participants to receive the benefits of donated foods in food distribution programs on the basis of an individual’s or group’s race, color, national origin, sex, age, political beliefs, religious creed, or disability. The Department found no factors that would negatively affect any group of individuals.

I. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35; see 5 CFR part 1320) requires that OMB approve all collections of information by a Federal agency from the public before they can be implemented. Information collections related to the provisions in this proposed rule were previously approved under OMB No. 0584-0293.

This rule would impact the reporting and recordkeeping burden for ITOs and State agencies under OMB No. 0584-0293 due to an expected change in number of households participating in FDPIR as a result of this rule and related changes to verification and household reporting requirements. Documentation supporting the eligibility of all participating households must be maintained by the ITOs and State agencies.

The approved information collection estimates under OMB No. 0584-0293 are as follows:

Estimated total annual burden: 1,079,172.92

Estimated annual recordkeeping burden: 746,400.42

Estimated annual reporting burden: 332,772.49

Changes resulting from this proposed rule would result in the following changes to OMB No. 0584-0293:

Estimated total annual burden: 1,081,071.76

Estimated annual recordkeeping burden: 746,428.44

Estimated annual reporting burden: 334,643.32

These information collection requirements will not become effective until approved by OMB. Once they have been approved, FNS will publish a separate action in the FEDERAL REGISTER announcing OMB's approval.

J. E-Government Act Compliance

The Department is committed to complying with the E-Government Act 2002 to promote the use of the Internet and other information technologies to provide increased opportunities for citizen access to Government information and services, and for other purposes.

K. Executive Order 13175

Executive Order 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. In late 2010 and early 2011, USDA engaged in a series of consultative sessions to obtain input by Tribal officials or their designees concerning the effect of this and other rules on Tribes or Indian Tribal governments, or whether this rule may preempt Tribal law. In regard to the provisions of this rule, a session attendee spoke in support of the provision that would eliminate the resource eligibility criteria. Another attendee spoke about Tribal per capita payments and how receipt of these payments negatively affects the eligibility of some households under current rules.

Reports from the consultative sessions will be made part of the USDA annual reporting on Tribal Consultation and Collaboration. USDA will offer future opportunities, such as webinars and teleconferences, for collaborative conversations with

Tribal leaders and their representatives concerning ways to improve rules with regard to their affect on Indian country.

We are unaware of any current Tribal laws that could be in conflict with the proposed rule. We request that commenters address any concerns in this regard in their responses.

List of Subjects in 7 CFR Part 253

Administrative practice and procedure, Food assistance programs, Grant programs, Social programs, Indians, Reporting and recordkeeping requirements, Surplus agricultural commodities.

Accordingly, 7 CFR Part 253 is proposed to be amended as follows:

PART 253-ADMINISTRATION OF THE FOOD DISTRIBUTION PROGRAM FOR HOUSEHOLDS ON INDIAN RESERVATIONS

1. The authority citation for 7 CFR Part 253 continues to read as follows:

Authority: 91 Stat. 958 (7 U.S.C. 2011-2036).

2. In §253.6:

- a. Amend the heading of paragraph (c) by removing the words “and resource”;
- b. Amend paragraph (c)(1) by removing the words “and resources”;
- c. Amend paragraph (c)(2) by removing the words “and resources”;
- d. Remove paragraph (d) and redesignate paragraphs (e) and (f) as paragraphs (d) and (e), respectively;
- e. In redesignated paragraph (d), redesignate paragraph (d)(2)(ii)(F) as paragraph (d)(2)(ii)(G), and add new paragraph (d)(2)(ii)(F);

- f. Amend redesignated paragraph (d)(3)(viii) by removing the second sentence;
- g. Add a new paragraph (d)(3)(xii);
- h. In redesignated paragraph (e), revise paragraph (e)(4), and, add a new paragraph (e)(5).

The revision and additions read as follows:

§253.6 Eligibility of households.

* * * * *

(d) * * *

(2) * * *

(ii) * * *

(F) Per capita payments that are derived from the profits of Tribal enterprises and distributed to Tribal members on a monthly basis.

* * * * *

(3) * * *

(xii) Per capita payments that are derived from the profits of Tribal enterprises and distributed to Tribal members less frequently than monthly (e.g., quarterly, semiannually or annually) are excluded from consideration as income.

* * * * *

(e) * * *

(4) Households must receive a medical deduction for that portion of medical expenses in excess of \$35 per month, excluding special diets, incurred by any household member who is elderly or disabled as defined in §253.2 of this chapter. Spouses or other persons receiving benefits as a dependent of a Supplemental Security Income (SSI), or disability and blindness recipient are not eligible to receive this deduction; however, persons receiving emergency SSI benefits based on presumptive eligibility are eligible for this deduction. The allowable medical costs are those permitted at 7 CFR 273.9(d)(3) for the Supplemental Nutrition Assistance Program (SNAP).

(5) Households that incur monthly shelter and utility expenses will receive a shelter/utility standard deduction, subject to the provisions below.

(i) The household must incur, on a monthly basis, at least one allowable shelter/utility expense. The allowable shelter/utility expenses are those permitted at 7 CFR 273.9(d)(6)(ii) for SNAP.

(ii) The shelter/utility standard deduction amounts are set by FNS on a regional basis. The standard deductions are adjusted annually to reflect changes to SNAP Quality Control data. FNS will advise the State agencies of the updates prior to October 1 of each year.

(iii) If eligible to receive a shelter/utility standard deduction, the applicant household may opt to receive the appropriate deduction amount for the State in which the household resides or the State in which the State agency's central administrative office is located.

* * * * *

3. In §253.7:

- a. Revise paragraph (a)(6)(i)(C);
- b. Add new paragraph (a)(6)(i)(D);
- c. Revise paragraph (c)(1);
- d. Remove paragraph (f)(2)(i) and redesignate paragraphs (f)(2)(ii) and (f)(2)(iii) as paragraphs (f)(2)(i) and (f)(2)(ii), respectively.

The revisions and addition read as follows:

§253.7 Certification of households.

(a) * * *

(6) * * *

(i) * * *

(C) Excess medical expense deduction. The State agency must obtain verification for those medical expenses that the household wishes to deduct in accordance with 7 CFR 253.6(e)(4). The allowability of services provided (e.g., whether the billing health professional is a licensed practitioner authorized by State law or other qualified health professional) must be verified, if questionable. Only out-of-pocket expenses can be deducted. Expenses reimbursed to the household by an insurer are not deductible. The eligibility of the household to qualify for the deduction (i.e., the household includes a member who is elderly or disabled) must be verified, if questionable.

(D) Standard shelter/utility deduction. A household must incur, on a monthly basis, at least one allowable shelter/utility expense in accordance with 7 CFR 253.6(e)(5)(i) to qualify for the standard shelter/utility deduction. The State agency must verify that the household incurs the expense.

* * * * *

(c) * * *

(1) The State agency must develop procedures for how changes in household circumstances are reported. Changes reported over the telephone or in person must be acted on in the same manner as those reported in writing. Participating households are required to report the following changes within 10 calendar days after the change becomes known to the household:

- (i) a change in household composition;
- (ii) an increase in gross monthly income of more than \$100;
- (iii) a change in residence;
- (iv) when the household no longer incurs a shelter and utility expense; or
- (v) a change in the legal obligation to pay child support.

* * * * *

Janey Thornton
Acting Under Secretary
Food, Nutrition, and Consumer Services

December 29, 2011_
Date

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